

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

DEQUE SYSTEMS INC.

Plaintiff,

v.

Case No. 1:24-cv-00217-AJT-WEF

BROWSERSTACK, INC., and
BROWSERSTACK SOFTWARE PVT. LTD.,

Defendants.

**DECLARATION OF RYAN J. MARTON IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I, Ryan J. Marton, declare as follows:

1. I am a partner with the law firm of Marton Ribera Schumann & Chang LLP, counsel for Defendants BrowserStack, Inc. and BrowserStack Software Pvt. Ltd. (collectively, “Defendants” or “BrowserStack”) in this matter. I submit this declaration in support of Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment (the “Opposition”). I have personal knowledge of the facts set forth herein unless otherwise indicated, and if called upon to testify, I could and would testify competently thereto.

2. BrowserStack first informed Deque on July 3, 2024 that the source code for BrowserStack’s accused Accessibility Testing Toolkit was being made available to Deque for inspection. BrowserStack followed up with Deque numerous times in July and August 2024, inquiring as to Deque’s review of BrowserStack’s source code. Deque, however, never reviewed BrowserStack’s source code, through a retained expert or otherwise.

3. Deque’s proposed trial exhibit list was filed on October 17, 2024 (*see* D.I. 123). I have reviewed this list and do not see the Accessibility Testing Toolkit software nor its source code among Deque’s proposed trial exhibits. I have also reviewed a copy of the exhibits that are listed therein and similarly did not see any exhibits that reflect the purported “BrowserStack False Advertisement” that Deque alleges in paragraph 63 of the First Amended Complaint (*see* D.I. 44-1).

4. On December 3, 2024, I visited the following URL: <https://www.deque.com/>. A true and correct copy of screenshots taken by scrolling down the contents of this webpage is attached hereto as **Exhibit 13**. When visiting this webpage, I did not see any reference to any Terms of Use. Even after I scrolled all the way down to the bottom of the webpage, I saw well over 40 hyperlinked words or phrases but none reflected any Terms of Use. I also visited the

webpage several times, both in normal and private/incognito mode, as well as after clearing my browsing history and cookies. Despite all these different ways in which I visited this webpage, I did not receive a pop-up window such as the one shown in Deque Ex. 29 submitted with Plaintiff's motion for summary judgment (*see* D.I. 147-31).

5. After I chose to click on the linked word "Legal" at the bottom of the <https://www.deque.com/> webpage, I was taken to another webpage reflecting "Deque Legal" (at the URL

https://www.deque.com/legal/?_gl=1*1r9vd6l*_up*MQ..*_ga*Mzg2MjUwMDQ0LjE3MzMzMyNTUyOTY.*_ga_C9H6VN9QY1*MTczMzI1NTI5NS4xLjAuMTczMzI1NTI5NS4wLjAuMA..).

A true and correct copy of screenshots taken by scrolling down the contents of this "Deque Legal" webpage is attached hereto as **Exhibit 14**. On that "Deque Legal" webpage I saw among the listed "Policies" a "Website Terms of Use" with a blue "Learn more" button below it.

6. Only after I chose to click on that "Learn more" button was I then taken to a "Terms of Use" webpage (at the URL https://www.deque.com/terms-of-use/?utm_medium=referral&utm_source=deque.com&utm_campaign=legal&_gl=1*ia0203*_up*Mzg2MjUwMDQ0LjE3MzMzMyNTUyOTY.*_ga_C9H6VN9QY1*MTczMzI1NzI5NS4yLjAuMTczMzI1NzI5NS4wLjAuMA). A true and correct copy printout of screenshots taken by scrolling down the contents of this "Terms of Use" webpage is attached hereto as **Exhibit 15**.

7. I also created and logged into a Deque account and was not required to view or agree to the alleged Deque website Terms of Use (Deque Ex. 22), either at the time of creation of the account or at the time of logging in.

8. On December 3, 2024, I also visited the following URLs which are identified in Exhibit A to Deque's unverified First Supplemental Response to Interrogatory No. 2 (*see* D.I.

141-3)¹: <https://docs.deque.com/issue-help/1.0.0/en/focus-on-hidden-item>,
<https://docs.deque.com/issue-help/1.0.0/en/focus-window-launches>,
<https://docs.deque.com/issue-help/1.0.0/en/aria-name-missing-incorrect>, and
<https://docs.deque.com/issue-help/1.0.0/en/aria-state-property-missing>. A true and correct copy of screenshots taken by scrolling down the contents of these webpages is attached hereto as **Exhibit 17**. I was not required to log in or sign into any account to view or access any of these webpages. These webpages also did not present, include a link to, or otherwise reference any Terms of Use.

9. On December 3, 2024, I conducted a Google search for “deque keyboard inaccessible” which returned certain search results. A true and correct copy of a screenshot taken of search results is attached as **Exhibit 18**. When selecting the first search result I was taken to the URL <https://docs.deque.com/issue-help/1.0.0/en/keyboard-inaccessible>. A true and correct copy of screenshots taken by scrolling down the contents of this webpage is also attached hereto as **Exhibit 18**. Again, I was not required to login or sign into any account to view or access this webpage. This webpage also did not present, include a link to, or otherwise reference Deque’s website Terms of Use.

10. Attached as **Exhibit 19** is a true and correct copy of a document Bates numbered DEQUE000001-DEQUE000025 and marked as Exhibit 0005 during the October 9, 2024 deposition of Harris Schneiderman. Attached with **Exhibit 20** is a true and correct copy of relevant transcript excerpts from Mr. Schneiderman’s October 9, 2024 deposition with relevant

¹ Deque also identifies the “Deque Issue Help Pages” (which is not one of the asserted copyrighted works) purportedly published at the URL, <https://docs.deque.com/issue-help/1.0.0/en/>. See D.I. 141-3 at Ex. A. However, when I visited that URL on December 3, 2024, I received a “Page Not Found” message. A true and correct copy of a screenshot taken of this URL is attached as **Exhibit 16**.

excerpts highlighted. The deposition of Mr. Schneiderman was transcribed by a certified court reporter. I was present at the deposition and the transcript accurately represents the proceedings.

As described by Mr. Schneiderman's testimony, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. Attached as **Exhibit 21** is a true and correct copy of BrowserStack's September 23, 2024 Objections and Responses to Deque's Notice of Deposition of BrowserStack.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on December 5, 2024 in San Francisco, California.

/s/ Ryan Marton
Ryan Marton